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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-....

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Additional-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
State of New York and
New York State Housing
Finance Agency
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3446

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Petitioners, the State of New York and State Housing Finance Agency, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated June 12, 1974, reversing a judgment of the United States District Court for the Southern District of New York, which had dismissed the complaint in this action.

Another petition has been filed for such a writ by the other defendants herein (No. 74-157). At the time of such

filing, the State petitioners still had pending before the Second Circuit a motion for rehearing. Such rehearing was denied on September 12, 1974.

The State petitioners now join in the petition filed by the other petitioners. To avoid repetition, we state that we adopt the position of those petitioners: that "membership" in or share ownership in a state-financed and supervised non-profit cooperative housing corporation, as described by the District Court (Exh. B, p. 4), did not constitute a "security" within the ambit of the Securities Act of 1933 and the Securities and Exchange Act of 1934 for the reasons, among others, stated in their petition (No. 74-157).

This petition is presented on *additional* grounds which affect only the State petitioners: the immunity of the State from suit in the federal courts by reason of the provisions of the Eleventh Amendment; and the gross misinterpretation by the Second Circuit of the provisions of a state statute, New York Private Housing Finance Law, § 32(5) providing for only a limited waiver of sovereign immunity.

Opinions Below

The opinion of the Court of Appeals is reported at 500 F 2d 1246; and is set forth in Appendix A to the connected petition (No. 74-157). The opinion of the District Court is reported at 366 F. Supp. 1117; and is set forth in Appendix B to that petition (No. 74-157).

Jurisdiction of This Court

The judgment sought to be reviewed was entered on June 12, 1974 and is set forth in Appendix C to petition 74-157. The petitioners' motion for rehearing was denied by Court of Appeals order, dated September 12, 1974 and is set forth in Appendix D to this petition.

The Questions Presented

In addition to the questions presented by petition 74-157, this petition presents the following questions:

1. Does a State waive its Eleventh Amendment immunity from suit in the federal courts by regulating the issuance of share membership in a cooperative housing corporation and by supervision of the construction of a low and middle income housing project, essentially non-profit in nature, particularly where such a corporation is furnished substantial subsidies through the aid in financing it received through mortgages provided at low interest rates by the State Housing Finance Agency?

2. Did the Court of Appeals misconstrue New York Private Housing Finance Law § 32(5) by giving it a blanket waiver construction (not shown to be attributed to it by the New York courts), even though the statute permits the State its Commissioner or its "supervising agency" (which the Housing Finance Agency is *not*) to be sued in the same manner as a private person, but only as to duties and liabilities arising out of Article 2 of the New York Private Housing Finance Law (known as the Mitchell-Lama Law)?

The Statutes and Rules Involved

The statutes and Rules involved are: those set forth in petition 74-157; and, in addition, as to the State petitioners, New York State Finance Law, § 32(5), which we reproduce herein as Appendix E.

Statement of the Case

We adopt, for the purpose of this additional petition, the statement set forth in petition 74-157 (pp. 4-9).

Proceedings Below

The portion of the prior petition's analysis of the proceedings below is accurate; and we adopt that analysis as to those proceedings insofar as they affect all defendants.

As to the state petitioners, it should be noted, however, that the Second Circuit passed upon Eleventh Amendment and immunity issues which the District Court, in dismissing the complaint herein, did not even reach. The Court of Appeals held the New York State Housing Finance Agency to be a "person" within the meaning of 42 U.S.C., § 1983; and found that the State itself had expressly waived immunity by the provisions of New York Private Housing Finance Law, § 32(5). See Appendix A to petition 74-157 (pp. 20-22).

Reasons for Granting Certiorari

(1)

We support fully the reasons set forth in the petition filed by the other petitioners-defendants (no. 74-157, pp. 11-27).

(2)

Additional reasons for granting a writ of certiorari stem from the unnecessary burden which will be imposed upon New York taxpayers and the federal courts by the continued presence in this litigation of the New York State Housing Finance Agency and the State itself as defendants. Even more significant from a national point of view is the implication of the Court of Appeals decision that a State has voluntarily subjected itself, by a limited waiver of immunity, to liability in the federal courts for the acts or omissions of a state regulatory agency in supervising the sponsorship, planning, development, construction and initial management of a state-aided real estate project, constructed entirely within the geographical limits of the State.

(A)

In the event that this Court permits the State's regulation of the development and financing of this new City to become the subject of litigation in federal Courts, it may be anticipated that an appropriate review of the details of such development and financing will also encumber the calendars of one or more District Court judges for years.

As a matter of court administration, this Court, even though it might not ordinarily choose to pass prior to final judgment, upon the Eleventh Amendment and immunity issues which we urge were erroneously decided by the Second Circuit, will surely recognize that it is judicially desirable not to burden the District Court with the task of reviewing unnecessarily the extraordinary issues which the State's defense of its regulatory processes will entail.

If the case goes back to the District Court in its present posture, with the Second Circuit's rulings on the Eleventh Amendment and immunity issues as the law of the case, the State may be obligated, upon a step-by-step basis, to attempt to justify each of the regulatory decisions involved in the development, construction and financing of the new City of 15,400 housing units. Our new Rome was not built in a day. Moreover, it was built during a period when an unprecedented inflationary economy caused the developers and regulatory agency to reevaluate prior judgments repeatedly to meet constantly changing conditions. A mass of material may accumulate in this single trial which will approach the volume presented to this Court in its current October Term. If this accumulation can be dispensed with, it should be.

(B)

The Second Circuit opinion, with reference to the State's Eleventh Amendment argument for dismissal, relied on the decision in *Parden* v. *Terminal Railway of Alabama Docks*

Department, 377 U.S. 184 (1964); but completely and blissfully disregarded this Court's decision in *Edelman* v. *Jordan,* 415 U.S. 651 (1974), which had been decided less than three months before and which effectively distinguished the *Parden* decision.

We shall argue, if certiorari is granted, that the Court of Appeals decision conflicts with the rationale of this Court's recent decision in *Edelman, supra.* By reason of a similar lapse and a failure, in addition, to understand the history of New York's efforts to develop adequate housing facilities, it found *Employees* v. *Missouri Public Health Dept.,* 411 U.S. 279 (1973) to be distinguishable, 500 F. 2d 1246, 1256, fn. 13.

We shall also assume, for the purpose of this subdivision of our argument that the State was engaged in the regulation of "securities" in the development of this cooperatively organized, state subsidized and state-aided housing development. Of course, we adhere to the argument presented by our co-defendants that the State's regulation did not relate to "securities" as federally defined.

(1)

In determining whether Congress has, in a particular instance, exercised its power to require waiver of immunity, federal courts must, of course, exercise their skills in statutory construction. Fortunately, this Court has given a great deal of recent guidance in how these skills are to be exercised.

The first question which must be answered is whether Congress has authorized suit of the sort sought to be brought against a class of defendants which includes the States. Justice Rehnquist stated this requirement in *Edelman, supra,* as follows (p. 678):

> "But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent."

When the instant case is measured against that standard, it fails. Congress has never authorized suit under either the 1933 or 1934 Acts against a class of defendants including States for violations of Section 17(a) of the 1933 Act or Section 10(b) of the 1934 Act.

Consider first the 1934 Act, upon which the plaintiffs principally rely. That statute contains no section authorizing a private right of action against *any* defendant for violation of Section 10(b). Section 10(b), as written by Congress, was to be enforced by the Securities Exchange Commission.

Of course, the courts have implied a private right of action for violations of Section 10(b) and Rule 10b-5. But Mr. Justice REHNQUIST makes it clear that an implied right of action will not satisfy the "threshold" test of *Edelman* (p. 679):

> "And while this Court has, in cases such as *J. I. Case* v. *Borak,* 377 U. S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964), authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant."

The logic of Justice Rehnquist's position is convincing. The question before a court looking at an asserted implied waiver of the Eleventh Amendment is whether Congress intended to require that waiver. Surely no Congressional intent to require waiver can be found in court creation of a private right of action.

Just as there is no Congressional authorization under the 1934 Act to sue a class of defendants including States, so also there is no such authorization under the 1933 Act for violations of Section 17(a). Section 17 of the 1933 Act is a criminal provision, obviously intended by Congress to be enforced as are all federal criminal laws. Congress created no private right to sue for violation of Section 17.

Some courts have implied a private right of action for violation of Section 17(a), *Mader* v. *Armel,* 402 F. 2d 158 (6th Cir. 1968). But an implied private right of action does not meet the "threshold" test of *Edelman.*

In sum, neither statute relied upon by the plaintiffs is sufficient to satisfy the test of *Edelman* v. *Jordan.* In neither act has Congress authorized suit against States for the sorts of violations alleged in the Complaint here.

(2)

In addition, this Court requires a showing that Congress intended to abrogate State immunity.

> "The question of waiver or consent under the Eleventh Amendment was found in those cases [*Employees, Parden* and *Petty* v. *Tennessee-Missouri Bridge Comm'n.,* 359 U. S. 275 (1959)] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity." *Edelman, supra,* at 678.

This showing must be a strong one, since

> "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . ." *Id.*

The court in *Edelman* adhered to its previous standard of explicit abrogation of the immunity,

> ". . . we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151, 171, 53 L. Ed. 742, 29 S. Ct. 458 (1909)." *Id.*

Even if there were a right of action against States under the 1933 and 1934 Acts, that would not necessarily imply Congress intended federal court jurisdiction of that right. In *Employees, supra,* the court affirmed its previous holding (*Maryland* v. *Wirtz,* 392 U. S. 183 (1968)) that Congress had created a right of action against the States. But the court denied this right implied any remedy by suit in federal court. In fact, the teaching of *Employees* is that Congress can and does create rights without remedies, at least where the remedy sought is a suit against an unconsenting State in federal court.

In both the 1933 and 1934 statutes, Congress carefully preserved the jurisdiction of the States to regulate securities. Section 18 of the 1933 Act provides:

> "Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person." (15 U.S.C. § 77r)

In nearly identical language, Section 28 of the 1934 Act preserves State jurisdiction under that Act (15 U.S.C. § 78bb). It would be strange, indeed, to discover that Congress had taken such great pains to protect explicitly State regulation of securities and then silently intended that, if any State exercised that jurisdiction, it would forfeit its Eleventh Amendment immunity.

Indeed, the very argument is absurd. If States had to risk federal court damage suits for huge amounts of money by regulating securities, they would all surely abandon the field. But that is clearly not what Congress intended when it so explicitly protected their jurisdiction.

In *Parden,* there was a statute which satisfied the "threshold" test of *Edelman* (See *Edelman* opinion at 678), but that is certainly not the case here. Entirely apart from

Edelman, the reach of *Parden* is severely restricted by *Employees.* Mr. Justice Douglas explained (p. 256):

> "Parden involved the railroad business which Alabama operated 'for profit.' [citation omitted.] Parden was in the area where private persons and corporations normally ran the enterprise."

Alabama was engaged in what Justice Douglas called an an "isolated state activity" of a proprietary nature usually performed by private enterprise. There was no logical reason to exclude the tiny minority of railroad workers employed by States from the coverage of the FELA; the court found Congress intended no such exclusion. Proprietary operation of a railroad is no essential governmental function and Alabama entered into it, the court found, knowing it would waive its Eleventh Amendment immunity thereby.

But the kind of implicit waiver in *Parden* is as far as this Court would go. Justice DOUGLAS found the operation of state hospitals involved in *Employees* was not a proprietary, but a governmental, function. (*Id.* at 256). And Justice MARSHALL, concurring, found Missouri had no real choice about operating its hospitals and thus did not "consent" to federal jurisdiction by continuing to operate them after the FLSA was amended. He said (p. 263):

> "For me at least, the concept of implied consent or waiver relied upon in Parden approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver . . . [In contrast with *Parden*]. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit."

If the ownership and operation of state hospitals is not a proprietary act which waives Eleventh Amendment im-

munity, *a fortiori* a purely governmental act such as regulation of securities does not do so.

In *MacKethan* v. *Commonwealth of Virginia,* 370 F. Supp. 1 (E. D. Va. 1974), Judge Merhige faced precisely the same issue which is now before this Court. There also a receiver of a savings and loan association sought to hold the Virginia banking authorities liable under the federal securities legislation on grounds of negligent supervision. Judge Merhige dismissed the Complaint, stating (370 F. Supp. 1, 4):

> "Plaintiff now attempts to extend the *Parden* doctrine into the area of pure governmental regulation. Such effort, in the Court's view, must fail. The impetus toward application of the *Employees* rationale is stronger here than in the case in which it was announced. While the operation of hospitals is not necessarily a governmental function, the specific nature of the hospitals involved in *Employees* gave state activity in that area a traditional base. In the present context, the state activity attacked is necessarily of a governmental nature. Regulation of securities is not an endeavor in which private persons are free to participate."

There is no language in the 1933 or 1934 Acts to support the plaintiffs' theory of waiver. *Employees* holds waiver must be supported by explicit language and fails to find it in the semi-proprietary activity of owning and operating hospitals. Judge Merhige in *MacKethan* supports conclusion here that the securities situation is even clearer than *Employees.* See also the opinion of Judge Hogan in *Mathews* v. *Fisher,* No. 8482 (S. D. Ohio 1974). The Second Circuit's theory of waiver is not sound in any respect.

(C)

The Second Circuit demonstrated a complete lack of familiarity with the functioning of the Mitchell-Lama Act and other provisions of New York's Private Housing Finance Law.

To illustrate: the panel's rejection of the State's claim of immunity is predicated upon its citation of Private Housing Finance Law, § 32(5). A footnote in that opinion sets forth that section, with emphasis added (500 F. 2d 1246, 1256, fn. 12):

> "With regard to duties and liabilities arising out of this article the state, the commissioner or the supervising agency may be sued *in the same manner as a private person.* No costs shall be awarded against the commissioner, the state, or the supervising agency, as the case may be, in any such litigation."*

With reference to State immunity from suit in *federal* courts, the panel completely ignored the caveat by Judge FRIENDLY in *Knight* v. *State of New York,* 443 F. 2d 415, in a decision by this very same Circuit, where he carefully noted (p. 419):

> "the Supreme Court has admonished that federal courts ought not 'to be astute to read the consent to embrace a Federal as well as state courts and that only a 'clear indication' of the state's intention to submit to suit in federal courts will surmount the Eleventh Amendment's bar, *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1944). See, to the same effect, *Ford Motor Co.*

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* The first sentence of this paragraph merely incorporated, with an appropriate addition of the words, "the supervising agency", the suability provision previously contained in Public Housing Law, § 15, as to the housing commissioner and the State. See 1964 New York State Legislative Annual, p. 342.

> v. *Department of Treasury of Indiana*, 323 U.S. 459, 465-466, 65 S.Ct. 347, 89 L.Ed. 389 (1945); *Kennecott Copper Corp.* v. *State Tax Comm.*, 327 U.S. 573, 577, 66 S.Ct. 745, 90 L.Ed. 862 (1946). We find no such 'clear indication' here."

With reference to the Housing Finance Agency, the panel completely overlooked the fact that the term "supervising agency" contained in the section quoted by Judge Oakes is strictly defined in Public Housing Law, § 2, as follows (Subd. 15):

> "The comptroller in a municipality having a comptroller; in a municipality having no comptroller, the chief fiscal officer of such municipality; except that in the city of New York it shall be the housing and development administration."

Further confusion in this litigation could be avoided by a complete deletion from the Second Circuit's opinion of its analysis relating to the defenses of the State and its Agency. The fact that the Agency is an "agency" does *not* qualify it as a "supervising agency".* In fact, it is a financing agency. Private Housing Finance Law, Art. 3. And if the purpose of this litigation is to impose any liability upon it, that liability may be borne ultimately by the State itself, regardless of any prior statutory commitments or prohibitions. In this aspect of the case, this Court can not blink its eyes at the fact that in *Knight* v. *State*, 443 F. 2d 415, this same Circuit Court also pointed out (443 F. 2d, at p. 420) that Knight's suit against state officers could be deemed a suit against the State, improperly brought; and noted the general rule in *Dugan* v. *Rank*, 372

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* Supervision of a state-aided limited profit company is assigned to the State Commissioner of Housing and Community Renewal, a person who has *not* even been made a party to this lawsuit. See Private Housing Finance Law, Art. 2; and Public Housing Law, § 3, subd. 1, Definitions (L. 1961, c. 398).

U.S. 609, 620 (1963) that:

> "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' • • • or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' "

See also the opinion of Judge McGowan for a unanimous court (Friendly, Ch. J. and Timbers, C.J.) in *Rothstein* v. *Wyman*, 467 F. 2d 226, 238 (2nd Cir. 1972), cert. den. 411 U.S. 921 (1973) rehearing den. 411 U.S. 988 (1973), underlining the rule that any waiver of the shield of the Eleventh Amendment must be shown to be clear and unequivocal, citing *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 54 (1944) and effectively distinguishing *Parden* (*supra*).

The waiver set forth in Private Housing Finance Law can not, on its face, be deemed to be a clear and unequivocal relinquishment of the State's immunity from *federal* court suit. Moreover, the Second Circuit's analysis completely disregards the fact that, as to obligations issued by the Agency itself specific judicial remedies are provided by New York Private Housing Law, § 50.

If the terms of the Finance Agency's mortgages are to be subjected to change by the federal district courts, and supervision of non-profit state-subsidized projects are to be subjected to the vagaries of a single District Judge's conception of a tenant's expectation of profit from participation in a non-profit cooperative enterprise, the District Court's assumption of jurisdiction for that purpose will be self-defeating. The wisdom and propriety of any additional subsidies to the plaintiffs should be determined by the people's representatives in the Legislature, not by the federal courts.

Conclusion

The Second Circuit's decision ignores this Court's decision in *Edelman* v. *Jordan* (*supra*). To avoid any further confusion in this action and to avoid the risk, which the Court of Appeals decision presents, of impairing the viability of the State's Mitchell-Lama housing program, a writ of certiorari should be granted. On its face, the panel's decision completely ignores the Circuit's own holding in *Knight* v. *State, supra,* 443 F. 2d 415. It also ignores the philosophy of the First Circuit decision in *Whitten* v. *State University Construction,* 42 LW 2506 (decided March 5, 1974). And its attempt to distinguish the recent decision in *Employees* v. *Missouri Public Health Employees,* 411 U.S. 279 (1973), on the ground that the State's housing activity came *after* the enactment of the federal securities laws is predicated upon a completely factual misconception; and a failure to recognize New York's long history of seeking to solve its housing problems by various methods including a State Housing Law (L. 1926, C. 823), which provided for limited divided housing companies (akin to limited-profit companies authorized by the Mitchell-Lama Act) and state supervision long before the Federal Securities Act of 1933. See *People* v. *Brooklyn Garden Apartments,* 283 N.Y. 373 (1940). See also *DeVoe* v. *Ostrander,* Civ. No. C 3, 74-95 (S.D. Ohio, decided Oct. 18, 1974), where the *Forman* reasoning as to waiver of State immunity for alleged improper regulation has already been rejected; and the cases cited therein.

The purpose of the Eleventh Amendment was to protect the States' fiscal integrity from attack in federal court. *Jordan* v. *Gilligan,* 400 F 2d 701, 706. If the Second Circuit's theory in this case were adopted, it would substantially undermine that constitutional policy, for States would be target defendants in virtually every stock fraud case where they had done any regulation. States would be faced

with huge contingent liabilities or the option of abandoning securities regulaition. Neither result was intended by the Congress or the framers of the Eleventh Amendment.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
State of New York and
New York State Housing
Finance Agency
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3446

by DANIEL M. COHEN
Assistant Attorney General and
Member of the Bar of the United
States Supreme Court

APPENDIX D

(Prior Appendices are contained in No. 74-157)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and seventy-four.
Present:

HON. PAUL R. HAYS
HON. JAMES L. OAKES,
Circuit Judges,
HON. A. SHERMAN CHRISTENSEN,
District Judge

Docket No. 73-2613

MILTON and ELLEN FORMAN, EARLE and PATRICIA MCFIELD, MICHAEL and PHYLLIS SICILIAN, JACK and DIANE R. BLACKIN, CARL and ALMA TROST, ROBERT and PAULINE CARRINGTON, GILBERT and GLORIA NARINS, MURRAY and HELENE VICTOR, JEROME and LEONARE BAER, HAROLD ASNIN, JOSEPH S. and WANDA D. O'CONNOR, et al.,
Plaintiffs-Appellants,

v.

COMMUNITY SERVICES, INC., UNITED HOUSING FOUNDATION, et al.,
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX E

§ 32. Supervision and regulation

The commissioner or the supervising agency, as the case may be, may:

* * * * * *

5. (a) Administer oaths, take affidavits, hear testimony and take proof under oath at public or private hearings; (b) subpoena and require the attendance of witnesses and the production of books and papers pertaining to any investigations and inquiries authorized by this article and examine them in relation to any matter concerning which the power to investigate is granted; (c) issue commissions for the examination of witnesses who are out of the state or unable to attend or are excused from attendance; (d) investigate into the affairs of a company and into the dealings, transactions or relationships of such company with third persons and into the affairs of any person, firm, corporation or other entity having a financial interest, whether direct or indirect, in the design, construction, acquisition, reconstruction, rehabilitation, improvement, financing or operation of any project undertaken by a company (e) intervene, as a matter of right, in any action or proceeding of which notice shall be given affecting the project of a company; (f) take such steps in such action or proceeding as may be necessary to protect the public interest.

With regard to duties and liabilities arising out of this article the state, the commissioner or the supervising agency may be sued in the same manner as a private person. No costs shall be awarded against the commissioner, the state, or the supervising agency, as the case may be, in any such litigation.